

Commercial Services in Wilderness Guidance for Determination of Extent Necessary

Introduction

The Wilderness Act of 1964 (Public Law 88-577) and recent case law clearly establish that wilderness managers must determine the extent to which commercial services are necessary in wilderness. This document outlines a general framework that can be used to assist National Park Service (NPS) units in the decision making process.

There may be slight variations in how park managers approach the extent necessary determination. Slightly different approaches may be appropriate depending on specific park needs or in the event of unique legislative mandates. However, in all cases, the fundamental purposes of preserving wilderness character and values should be the primary focus.

The Wilderness Act

Section 4(c) of the Wilderness Act states “ Except as specifically provided for in this Act, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this Act and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this Act (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area.”

Section 4(d) of the Act sets forth some narrow exceptions to the general prohibitions contained in Section 4(c). Specifically with regard to commercial activities, Section 4(d)(6) of the Wilderness Act states “Commercial services may be performed within the wilderness areas designated by this Act to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas.” The “purposes” referred to in Section 4(d)(6) are those enumerated in Section 4(b), which states “...wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use.”

NPS Management Policies 6.4.4 Commercial Services states that “Wilderness oriented commercial services that contribute to public education and visitor enjoyment of wilderness values or provide opportunities for primitive and unconfined types of recreation may be authorized if they meet the "necessary and appropriate" tests of the National Park Service Concessions Management Act of 1998 (Public Law 105-391), Section 4(d)(6) of the Wilderness Act, and if they are consistent with the wilderness management objectives contained in the park's wilderness stewardship plan. Activities such as guide services for outfitted horseback, hiking, mountain climbing, or river trips and similar activities may be appropriate and may be authorized if conducted under terms and conditions outlined in the park's wilderness stewardship plan and/or in legislation authorizing these types of commercial use.”

In addition to the criteria set forth in *Management Policies* above, permitted commercial services must adhere to the minimum requirement concept in all aspects of their operations (*Management Policies*, section 6.3.5 and 6.4.4).

The only structures or facilities used in support of such commercial services that are allowed in wilderness are temporary shelters, such as tents, which must be removed from the wilderness after each trip unless exceptions are clearly identified in the park's Wilderness Stewardship Plan. There may also be specific exceptions to this policy identified within individual park wilderness enabling legislation. Additionally, parks and units in Alaska should refer to specific requirements under the Alaska National Interest Lands Conservation Act (ANILCA).

This guidance document is not intended to address commercial activities in wilderness that may qualify as prior existing rights. Park units should consult with the Office of Solicitor on questions regarding the management of such activities.

What is a Commercial Service?

The Wilderness Act does not define the term “commercial service.” For a definition of “commercial service” and a discussion of what constitutes a commercial service (including examples of special situations which are not deemed commercial services) see [Appendix A](#).

Framework for a Basic Process

Managers and decision-makers should begin with a determination of whether the fundamental activity that would be commercially supported is appropriate in the park and in wilderness. If the activity is appropriate in wilderness, consider whether or not the activity should be provided by a commercial service (e.g. a Commercial Use Authorization, or as an element of a concessions contract). Lastly, if it is necessary to provide the activity commercially, determine to what extent it is necessary (the amount of commercial service, or the capacity for that commercial service).

This analysis could occur in a comprehensive planning effort, for instance, in a Wilderness Stewardship Plan. The analysis could occur as a part of a Commercial Services Plan, however managers must ensure that the analysis includes the necessary wilderness elements and considers all user groups (not solely commercial services users), especially in regards to capacity and determining allocations between commercial and non-commercial users. This analysis could also occur on a smaller scale, for example, the case-by-case review of a request to conduct a particular commercial service in wilderness.

Decision Makers

The Extent Necessary Determination (END) should be prepared by staff members with knowledge and experience appropriate to the issues. These subject matter experts should use an interdisciplinary team (IDT) approach in defining and determining the appropriate activities, the necessity for commercial services to support those activities, and the extent (i.e., amount) of

commercial services necessary. This approach must be highly-interactive, and include discussions between park subject matter experts, specialists from other NPS offices, and senior park leadership. Parks may wish to use non-agency individuals to provide additional insights. It is recognized that the park staff may be small and that subject matter experts may be restricted to only one or two individuals. The need for an IDT does not mean that a large group of specialists must be assembled for every aspect of the END. What it means is that the one or two specialists should be consulting with a number of sources, agency staff (including concessions management, natural resource management, Solicitors Office, etc.), and non-agency individuals as needed to make sound and well-reasoned decisions.

The IDT used to create the END should be seen as comparable to the National Environmental Policy Act (NEPA) interdisciplinary process (NEPA: Public Law 91-190); Council on Environmental Quality (CEQ) (40 C.F.R. 1502.6). The END document is then incorporated into a comprehensive Wilderness Stewardship Plan. In [Appendix B](#) you will find examples of completed extent-necessary determinations.

1. Define the Activity

See [Appendix C](#) *Guidance for Determination of Extent Necessary for Commercial Services in Wilderness - Flowchart*. The flowchart has a blue section that describes a process to determine if the activity is proper and the commercial service necessary; an orange section that frames a discussion on capacity and a yellow section that assists with allocation of commercial services to non-commercial opportunities. Allocation of commercial services could also be presented in a planning process (NEPA).

First in this process is defining the fundamental activity being considered for commercial services. As an example, for a commercial rafting enterprise, the basic activity is river rafting. Consider initially the fundamental *activity*, and is it appropriate in wilderness without regard to whether it is commercial or non-commercial in nature. Next determine if there is a need for a commercial service to support the activity.

2. Concessions Management Improvement Act.

In order to qualify as a commercial service, the activity must meet the standards of the 1998 Concessions Management Improvement Act. NPS Management Policies discusses when a commercial service will be authorized within a park. Management Policies states that a decision to authorize a commercial service in a park will be based on the determination that the service is 1) consistent with the park's enabling legislation, 2) is complementary to a park's mission and visitor service objectives, 3) is necessary and appropriate for the public use and enjoyment of the park in which it is located, 4) is not, and cannot be, provided outside park boundaries, and 5) will not cause unacceptable impacts.

3. Is the activity proper for realizing a wilderness purpose?

Section 4(d)(6) authorizes commercial services that are “proper” for realizing wilderness purposes. Proper means “marked by suitability, rightness, or appropriateness.”¹

A determination on whether an activity is proper or appropriate for realizing a wilderness purpose is best informed by answering a series of questions about the activity.

Questions to consider when determining whether an activity is proper and appropriate in wilderness include:

- Is the activity consistent with laws, policies and regulations?

Common wilderness and non-wilderness outdoor activities include rock climbing, photography, horseback riding, and overnight camping, to name a few. However, other activities are banned in wilderness by law, regulation or policy. Examples of prohibited activities include mountain biking, hang gliding (aircraft delivery), and motorboat use.² Management policies or management plans may also indicate that certain activities are inconsistent with park management objectives for wilderness areas. See *Management Policies*, section 6.4.3, for guidelines on recreational use in wilderness.

- Is the activity consistent with the purpose and significance of the park?
Consult enabling legislation for the park and wilderness area and other relevant legislation. Park specific guidance includes general management plans, wilderness stewardship plans, commercial services plans, foundation documents, and other applicable documents.
- Does the activity impact park resources or values?
Specific resource protection concerns may dictate that an activity is inappropriate; a simple example is rock climbing in critical nesting areas. As another example, stock use may be inappropriate in sensitive high-alpine meadows.
- Does the activity fulfill one of the purposes (recreational, scenic, scientific, educational, conservation, or historic) of wilderness?
Activities provided by a commercial service must fulfill one or more of the purposes of wilderness, as stated in section 4(d)(6) of the Wilderness Act. [Appendix D](#), *Wilderness Purposes and Examples*, explains this issue in detail.

Is the activity proper for realizing a wilderness purpose?

- Is the activity consistent with laws, policies, and regulations?
- Is the activity consistent with the purpose and significance of the park?
- Does the activity impact park resources or values?
- Does the activity fulfill one of the purposes (recreational, scenic, scientific, educational, conservation, or historic) of wilderness?
- Is the activity compatible with desired conditions for wilderness character?

¹ <http://www.merriam-webster.com/dictionary/proper>

² Note that Congress has authorized motorboat use in some wilderness areas. Check the legislation for your wilderness area.

- Is the activity compatible with desired conditions for wilderness character?

Wilderness recreational activities – whether commercial or non-commercial in nature – should not degrade or diminish wilderness character. It is not necessary that the activity *enhance* wilderness character, but it is important that the activity not negatively affect or degrade wilderness character. The *activity* should be closely analyzed for its effect on wilderness character; the *commercial nature* of the activity should not be a factor when looking at the effect on character. Commercial activities should be free from unnecessary attributes (for instance, advertisements such as signs, placards, or banners) which could have additional impact on wilderness character.

The answers to these questions will assist you in determining if the activity is appropriate in wilderness or not. The answers are not necessarily a yes or no decision but a piece to consider within the totality of the decision making process. If the activity in question is appropriate in wilderness, the next step is to consider whether or not it is necessary to provide the activity commercially.

4. Are Commercial Services Necessary to Support the Activity?

In *High Sierra Hikers v. Blackwell* 390 F.3d 630 (9th Circuit, 2004) the Ninth Circuit Court of Appeals issued a ruling setting forth the criteria that must be satisfied before a wilderness manager can authorize commercial services under Section 4(d)(6) of the Act.³ The Court examined the specific language of Section 4(d)(6) and in particular the language stating that commercial services may only be authorized “to the extent necessary.” According to the Court, Section 4(d)(6) requires wilderness managers to make a “specialized” finding of “necessity” before authorizing commercial services in wilderness. In this specialized finding, the agency must also “show that the number of permits [or other authorizations] granted was no more than was necessary to achieve the goals of the Act.” This step and the following one are designed to help wilderness managers meet the requirements of Section 4(d)(6) as interpreted by the Appeals Court.

Is the commercial service necessary?

- Does the commercial service contribute to visitor understanding and appreciation of the park’s purpose?
- Does the commercial service assist in managing visitor use and educating visitors?
- Are specialized skills, knowledge or equipment required or highly advised?
- Are introductory experiences appropriate?
- Are special conditions or controls warranted to protect resources, or even the visitors themselves?
- Is the commercial service an essential (unique) service that is not available within a reasonable distance from the park?

Determine if the activity – which has been deemed “proper” for realizing one or more wilderness purposes under preceding steps – should be provided commercially. In the *High Sierra Hikers* opinion, the Court of Appeals found that because the Wilderness Act was written in broad terms and allows for some balancing of competing goals, an agency determination that commercial

³ Decisions issued by the U.S. Court of Appeals for the Ninth Circuit are binding within the Ninth Circuit which includes the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington. Approximately 80% of designated wilderness is located in these states. Other circuits have not yet issued rulings interpreting Section 4(d)(6). Because the majority of wilderness is located within states where opinions of the Ninth Circuit are binding, this framework is designed to help parks comply with the Ninth Circuit’s decision.

services were needed to provide access to those people who would otherwise not be able to gain access for themselves or their gear could support a finding of necessity. However, the *necessity* for commercial support services should not be confused with visitors' *desire* for commercial support when conducting the activity. With this guidance in mind, the following criteria and questions should be considered.

In addition, when answering the necessity question, thoughtful consideration must be given to the visitor experience in the wilderness. Managers must address basic questions about the visitors' wilderness experience, and what opportunities will be available to them. The availability – or unavailability – of a commercial service may have profound impact on the experience a visitor may be afforded in wilderness.

- Does the commercial service significantly contribute to visitor understanding and appreciation of the park's purpose in general and wilderness in particular?
- Are specialized skills, knowledge or equipment required or highly advised?

Deciding on the availability of commercial services ultimately determines which wilderness opportunities may be available to certain wilderness users. Users who don't have the specialized equipment may not be able to participate in the activity without using a commercial service provider. Users who do not possess skills or knowledge required by an activity (such as white-water rafting, or horse-packing) may only be able to experience an activity with a commercial service provider.

- Are introductory experiences appropriate?

Similar to the issue of specialized skills or knowledge, access to introductory experiences with a commercial provider may be appropriate.

- Are special conditions or controls warranted to protect resources, or even the visitors themselves?

Special resource concerns may play into the decision to provide an activity through a commercial service. There may be a need to protect sensitive resource by allowing certain activities to occur only with a controlled and regulated commercial provider.

- Is the service an essential service that is not available within a reasonable distance from the park?

When analyzing necessity, managers should be cautious about looking to opportunities for the commercial services outside of wilderness to meet visitor experience needs. The mere fact that visitors could engage in a commercially-provided activity outside of wilderness should not be reason alone to conclude that the service is not necessary in wilderness. Wilderness areas are unique and often one-of-a-kind experiences.

In summary, when analyzing the necessity for commercial services, the visitor experience must be considered. Park managers must address what types of opportunities will be made available to the visitor. Should visitors without specialized skills or equipment be given an opportunity to experience an appropriate activity with a commercial provider? Should visitors be afforded an opportunity for an introductory experience in wilderness with a commercial provider? Should visitors be required to experience certain activities with a commercial provider or guide, in order to achieve specific resource protection measures?

Many of the factors you should consider in this guidance do not lead to a yes or no decision but are pieces in the complex decision you much make.

5. To What Extent Are Commercial Services Necessary?

If it is determined that the activity is proper for realizing a wilderness purpose and should be provided commercially, the next step is to determine the extent (or amount) of commercial services that are necessary. The word “necessary” need not be interpreted as meaning absolutely necessary or essential.⁴ Rather, it is permissible to interpret the word “necessary” as meaning reasonably useful or appropriate to achieve the desired goals, which in this case is the realization of wilderness purposes. Because this step requires managers to identify the amount of commercial services that will be allowed, managers will need to understand the area’s capacity to support recreational uses while preserving wilderness character.

In order to determine an extent or amount of commercial services, managers should ideally determine the visitor capacity in order to allocate use (commercial and non-commercial).

Once capacity is determined, consideration must be given to how this capacity will be allocated:

- If use is not near capacity, managers must determine the appropriate amount of commercial services relative to non-commercial opportunities. This can be done through a visitor capacity study, current use, or establishing threshold’s that would trigger further analysis.
- If use is at or near capacity, use allocations could be redistributed between commercial and non-commercial users, or determined that no commercial service is necessary. *Director’s Order 41* states that “wilderness areas at, or near, visitor capacity may not be able to accommodate any commercial services either at all or during peak capacity periods.” However, if there are compelling reasons for commercial services to support proper

Determining Capacity

There are a number of methods to determine capacity. Parks must determine what method fits the needs of that area. For more information on capacity and determining capacity see *Management Policies 2006*, section 8.1.1, as well as *The Visitor Experience and Resource Protection (VERP) Framework: A Handbook for Planners and Managers*. See also *Numerical Visitor Capacity: A Guide to Its Use in Wilderness*, USFS General Technical Report RMRS-GTR-247, by David Cole and Thomas Carlson. Or the Interagency Visitor Use Management Council position paper on *Visitor Use Management*.

⁴ *Wilderness Watch v. U.S. Fish and Wildlife Service*, 629 F.3d. 1024 (9th Cir. 2010) (interpreting the word “necessary” in Section 4(c) of the Wilderness Act to mean less than absolutely necessary).

activities, non-commercial allocations could be adjusted in order to allow for a necessary amount of commercial service allocation.

There may be occasions when managers make allocation decisions without a Visitor capacity Study. Managers may, for example, need to determine commercial services allocations (extent) for a wilderness area with extremely low visitor use and no known impacts to wilderness character or wilderness resources. In circumstances where use is not impacting wilderness character and there are no established visitor capacity data available, it may be acceptable and appropriate to set sufficiently low allocations and to implement a monitoring program in order to assess developing impacts to wilderness character. If impacts to wilderness character begin to appear, then managers would respond by either reducing commercial services allocations, adjusting overall use levels, establishing visitor capacities, or taking other necessary measures to ensure that wilderness character is preserved (adaptive management).

Consideration should be given to the potential long-term and short-term impact use may have on each quality of wilderness character, with an indication of whether such use would degrade, maintain, or improve each quality of wilderness character. Wilderness character measures can be used to monitor the condition of wilderness qualities affected by commercial use.⁵

Ultimately, the extent or amount of commercial services is a management determination of the quantity which is reasonably necessary and appropriate to achieve the desired goals of the wilderness area, which in this case is the realization of wilderness purposes.

Monitoring

Visitor use - both commercial and non-commercial - should not degrade wilderness character, and should preserve opportunities for solitude and primitive and unconfined recreation (see *Keeping It Wild in the National Park Service, January 2014* and wilderness character guidance documents). Monitoring to preserve or enhance wilderness character should include monitoring use levels and the impacts of both commercial and non-commercial users. Managers must respond to inappropriate or unacceptable impacts resulting from use levels or types of user allocations through adaptive management.

Planning and NEPA

How do “extent necessary determinations” fit with planning? A number of different types of planning processes could include the determination of the extent necessary for commercial services in wilderness, including general management plans, wilderness stewardship plans, and commercial service plans. Making this determination within a planning framework includes an analysis of impacts and public involvement. Zoning can be completed as part of these plans to (generally) define the types and amounts of use, as well as other designations intended to preserve wilderness character. Through the creation of zones, commercial use in different portions of a wilderness can be managed in a different manner. Maintaining wilderness

⁵ How to determine wilderness character – see *User Guide to Integrating Wilderness Character in Park Planning, Management and Monitoring*.

character identified in zoning should be a key element in the evaluation of a proposed commercial service.

Managers should thoroughly consider how the commercial services extent necessary determination is addressed in plans with multiple alternatives. Depending on differences in the objectives for visitor use that are expressed in the plan alternatives, potentially both the rationale for the need for the commercial service(s), and the amount or extent of commercial services may vary across alternatives. Therefore, plans which propose different levels or types of commercial services should develop the analysis or work through the process for each alternative in order to allow for thorough analysis and more complete public notification and engagement. Plans which propose one level of commercial service across all alternatives may allow for a single extent analysis in the preferred alternative. Park managers may need to consult with regional concessions staff, NEPA and planning specialists, and regional solicitors when developing draft alternatives and the corresponding extent necessary determination.

Parks completing wilderness stewardship plans or general management plans can use wilderness character measures to create standards which can help inform establishment of visitor capacities for all users, commercial and non-commercial. Areas at or near capacity for visitor use should consider prohibiting additional types or increased amounts of commercial use. Maintaining consistency with user capacity standards for a given location and season should be a key element in the evaluation of a proposed commercial service. Areas with an established visitor capacity must next determine how use will be allocated between the general public, commercial users, and those with special use permits. The amount, timing, type, and location of use must all be determined using a NEPA compliant public participatory process.

Documenting the Extent Necessary Decision

The final decision regarding the extent necessary of commercial services should be appropriately documented. In a comprehensive planning effort, such as a wilderness stewardship plans or commercial services plans, the decision should be captured in a Finding of No Significant Impact (FONSI) or Record of Decision (ROD). If not part of a more comprehensive planning process, the decision should be recorded in a detailed document outlining the analysis, decisions made and the rationale for those decisions, and the actual allocations. See [Appendix E](#), *Extent Necessary Determination Decision Document Template*. As for all important administrative decisions, maintaining an accurate administrative record of the decision-making process is crucial.

Apply the minimum requirements concept to commercial services operating plans

NPS Management Policies 6.4.4 requires the application of the minimum requirement concept to the operating plans of commercial services providers who operate in wilderness. When commercial services operating plans are formulated, activities and methods which have the least amount of negative effect on wilderness character should be considered. Commercial services in wilderness, when authorized, must be managed according to the minimum requirements concept, and the commercial activity should have the least amount of impact on wilderness character.

Commercial activities in wilderness should be free from unnecessary attributes and should have no more impact than an equivalent non-commercial activity.